

UNITED STATES BANKRUPTCY COURT
DEPARTMENT 2
JUDGE LOUISE DeCARL ADLER, PRESIDING
THURSDAY, OCTOBER 8, 2015

10:30 AM

1 - 12-01941-LA Ch 7 DAVID JAMES FOTI

ADV: 14-90027 GERALD DAVIS, TRUSTEE v. GERALDINE JOAN FOTI & DAVID JAMES FOTI

- 1) PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES NOT IN DISPUTE FILED BY RICHARD C. NORTON ON BEHALF OF GERALD DAVIS, TRUSTEE.

Tentative Ruling: Motion for Summary Judgment **DENIED**.

Summary Judgment is appropriate when the moving party establishes that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). To defeat a motion for summary judgment, the non-moving party must do more than simply show that there is some doubt as to the facts of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252(1986). The party opposing the motion for summary judgment must establish the existence of a genuine of material fact and may not rest upon its pleadings or mere assertions of disputed facts to defeat the motion. *Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 547, 586 (1986).

In this action, the Trustee seeks relief under 11 U.S.C. Sec. 548 (a)(1)(A) or (a)(1)(B). In order to obtain that relief, he must establish that there was a transfer of an interest of the debtor in property. The transfer of a property interest that the debtor holds in trust for another will not qualify for this purpose. *Dunham v. Kisak*, 192 F.3d 1104, 10090 (7th Cir. 1999) (The debtor's transfer of a "property interest" must be established before the transfer can be deemed fraudulent and set aside).

Here, the Trustee has failed to establish that the debtor held an interest in the property as contemplated in Sec. 548. The deposition transcripts of both Mrs. Foti and the debtor are replete with statements that Mrs. Foti intended the 1996 transfer to be in furtherance of her testamentary purposes; that it was not intended to have present effect to transfer ownership to the debtor. Similarly, the debtor testified that the 1996 quitclaim deed from his mother to the two of them as joint tenants was without his knowledge, acquiescence or consent. Both Mrs. Foti's lack of intent to presently transfer an interest to the debtor in 1996 and the debtor's lack of acceptance of the transfer raise serious triable issues of fact which, if established at trial, would appear to defeat the relief sought by the Trustee. The fact that the debtor was included in the City of San Diego's code enforcement lawsuit is insufficient to establish debtor's knowledge of his ownership in the property since the debtor's brothers, who held no recorded ownership interest, were also included in the lawsuit. Moreover, the testimony of the defendant Geraldine Foti and the debtor establishes that Mrs. Foti transferred the property into joint tenancy for estate planning purposes. At most, the Trustee has established that the debtor held the property in trust for Mrs. Foti.

Additionally, the Trustee cannot assert hypothetical *bona fide* purchaser status because he had constructive notice of the Defendant, Mrs. Foti's, sole interest in the property. [11 US.C. Sec. 544(a)(3) "confers BFP status on a trustee." *In re Whitting*, 311 B.R. 539, 543 (BAP 9th Cir. 2004)] Under California law, constructive notice can deny a trustee status as a hypothetical BFP under Sec. 544(a)(3). On the petition date,

the Trustee had constructive notice of the deed from Mrs. Foti to the Geraldine Foti Living Trust because a record search would have revealed the recorded deed. Even though the deed to the trust was recorded a mere four hours before the debtor filed his bankruptcy petition, the prior quit claim deed from the debtor to Mrs. Foti was recorded on May 2011. A search of the chain of title would have revealed that the property was no longer subject to joint tenancy ownership because Mrs. Foti alone had owned the house since May 2011. An inspection of the property would have revealed that Mrs. Foti was in possession of the property--a fact entirely consistent with ownership of the property at the time the debtor's bankruptcy petition was filed.

If counsel for the trustee is prepared to accept the tentative ruling, he should notify counsel for Mrs. Foti and the debtor and the courtroom deputy, and appearances will be excused. In that event, this tentative ruling will suffice as findings of fact and conclusions of law and counsel for the non-moving party shall prepare and lodge an order.

2) PRE-TRIAL STATUS CONFERENCE (Fr 8/20/15)

ATTORNEY: RICHARD C. NORTON (GERALD DAVIS, TRUSTEE)

ATTORNEY: DONALD E. WOLFE (DAVID JAMES FOTI, GERALDINE JOAN FOTI)

1 - 12-01941-LA Ch 7 DAVID JAMES FOTI

ADV: 12-90163

KDR PARTNERSHIP & MONA VERNOS & MARCIA RITZ v. DAVID JAMES FOTI & GERALDINE JOAN FOTI & KDR ENTERPRISES, INC.

PLAINTIFFS MOTION FOR SUMMARY JUDGMENT ON FIFTH CLAIM FOR RELIEF FILED BY DAVID G. JIMENEZ ON BEHALF OF KDR PARTNERSHIP, MARCIA RITZ, MONA VERNOS.

Tentative Ruling: Motion for Summary Judgment on 11 U.S.C. Sec. 727(a)(3) claim **DENIED.**

Sec. 727(a)(3) states that the court shall grant a discharge unless the debtor has concealed, destroyed, mutilated, falsified or failed to keep or preserve any recorded information, including books, documents, records and papers from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure was justified under all the circumstances of the case. Denial of discharge under this section is inherently factual. It requires the court to weigh evidence as to: (1) whether the debtor maintained and preserved adequate records under the totality of the circumstances; (2) whether the failure to do so makes it impossible to ascertain the debtor's financial condition and material business transactions; and (3) whether the debtor has provided an adequate explanation under all the circumstances to justify the inadequate or nonexistent records. *In re Cox*, 41 F.3d 1294, 1296 (9th Cir. 1994).

The facts in this case establish that the Debtor produced some records in response to the Request for Production of Documents (the "2013 Doc. Request"). [Plaintiffs' Ex. 12 (producing documents in response to, *inter alia*, Request Nos. 1-6, 8-30 & 34-41, ect.)] Further, the facts establish that the Debtor objected to many of the various discovery requests for various reasons; he responded that no documents existed as to other requests; and he responded that he would not produce documents as to others, again, for various reasons. [Ex. 12] Plaintiffs did not bring a motion to compel.

There was a Second Request for Production served in connection with a deposition notice. The notice of deposition and Request for Production (the Second Request") was on four days' notice. The Second Request asked for supplemental documents directed at the same categories as the 2013 Doc. Request. At his deposition, Debtor tendered those documents he could obtain on the short notice; objected to the Second Request on a number of grounds including inadequate notice; disclosed where the records could be obtained for the documents that existed and stated what records did not exist. The plaintiffs did not bring a motion to compel w/r/t the Second Request either.

In this case, the Court cannot find the complete absence of records relating to his businesses. Unlike the debtor in *In re Caniva*, 550 F.3d 755 (9th Cir. 2008), debtor has produced those business records that were in his physical possession and raised objections to the 2013 Doc. Request and the Second Request which, regardless of merit, remain unresolved due to Plaintiff's failure to meet and confer and bring motions to compel.

During his deposition, Debtor testified

(1) that banking records can be obtained from his financial institutions, and he offered to stipulate to a late subpoena and to waive any objections to their introduction into evidence.

(2) that the hair and nail salon is his wife's business and, aside from the 2012 tax information, the business records could be obtained from her and/or they do not exist because neither he nor his businesses have ever done business with her salon.

(3) that he had informed counsel for movant that records could be

obtained from his accountant

(4) that he had a standard written employment agreement with Skipad; he could obtain it from their corporate office.

(5) that payments and expenses of KDR Partnership were handled by Ken Johnson (now deceased partner), who hired a couple of different bookkeeping services for this purpose and that Johnson had the checking account and wrote the checks.

Based on the foregoing, the testimony of Debtor establishes that records have been produced and/or they exist or, as to KDR Partnership records, the explanation may be that the deceased partner maintained the records (a factual determination). There is no evidence that Plaintiffs have reviewed the universe of records that could be obtained and found them inadequate. More importantly, there is no evidence that Plaintiffs made any effort to challenge the Debtor's discovery objections or to compel the Debtor to produce the responsive records in his possession, custody or control.

This is not a case where we have a sophisticated Debtor who affirmatively testified that he paid everything in cash and never kept receipts, did not have a checking account or credit cards and had no personal or business records except tax returns which were prepared from his memory. See *In re Jacobowitz*, 309 B.R. 429, 433-4 (S.D.N.Y. 2004). Regardless, even in *Jacobowitz*, summary judgment was not granted until after the court conducted an evidentiary hearing, giving the debtor one last opportunity to produce records. While this Court may not be as indulgent, surely where Plaintiffs have failed to avail themselves of a means to resolve the discovery dispute by obtaining an order compelling production, they cannot expect this Court to rule as a matter of law that the Debtor's discharge should be denied under Sec. 727(a)(3).

Counsel for the parties should come to this hearing prepared to discuss alternative trial dates in the latter half of November. This matter is going to trial before recalled Bankruptcy Judge Marlar who is unavailable on the dates originally set by this Court.

NOTE TO COUNSEL FOR PLAINTIFFS: Court is unclear how she has jurisdiction over Geraldine Foti (not a debtor) or KDR Enterprises (also not a debtor) in a complaint objecting to discharge and nondischargeability. Unless counsel can articulate a theory presently not disapproved by the USSC, the Court believes counsel should consider promptly dismissing the non-debtor defendants from this adversary proceeding.

ATTORNEY: DAVID G. JIMENEZ (KDR PARTNERSHIP, MARCIA RITZ, MONA VERNOS)

ATTORNEY: DONALD E. WOLFE (DAVID JAMES FOTI, GERALDINE JOAN FOTI)

02:00 PM

1 - 14-06455-LA Ch 7 PAUL MARK TABET

ADV: 14-90234 JOHN C ROBERTS v. PAUL MARK TABET

TELE

PRE-TRIAL STATUS CONFERENCE (Fr 6/25/15)

ATTORNEY: VINCENT RENDA (JOHN C ROBERTS)

2 - 14-06455-LA Ch 7 PAUL MARK TABET

ADV: 14-90233 ERIC LEITSTEIN v. PAUL MARK TABET

TELE

PRE-TRIAL STATUS CONFERENCE (Fr 6/25/15)

ATTORNEY: VINCENT RENDA (ERIC LEITSTEIN)

3 - 11-17575-LA Ch 7 CHRISTOPHER WILLIAM & JENNIFER LYNN FINCH

ADV: 12-90435 MATTHEW PRAIZNER, ET AL v. CHRISTOPHER FINCH

PRE-TRIAL STATUS CONFERENCE

ATTORNEY: ROBERT M. DANIELS (MATTHEW PRAIZNER)

ATTORNEY: JACK R LEER (CHRISTOPHER FINCH)

4 - 12-01941-LA Ch 7 DAVID JAMES FOTI

ADV: 14-90027 GERALD DAVIS, TRUSTEE v. GERALDINE JOAN FOTI & DAVID JAMES FOTI

PRE-TRIAL STATUS CONFERENCE (Fr 8/20/15)

ATTORNEY: RICHARD C. NORTON (GERALD DAVIS, TRUSTEE)

ATTORNEY: DONALD E. WOLFE (DAVID JAMES FOTI, GERALDINE JOAN FOTI)

5 - 15-00905-LA Ch 7 JOHN M LONNEKER

ADV: 15-90081 NTR BULLION GROUP LLC v. JOHN M LONNEKER

PRE-TRIAL STATUS CONFERENCE

ATTORNEY: VICKIE L DRIVER (NTR BULLION GROUP LLC)

ATTORNEY: JONATHAN HEMBREE (NTR BULLION GROUP LLC)

ATTORNEY: JOHN W. CUTCHIN (JOHN M LONNEKER)

02:00 PM

6 - 13-12024-LA Ch 7 ANDREW SEISOON CHUNG
ADV: 14-90041 ELITE OF LOS ANGELES, INC. & SAN DIEGO TESTING SERVICES,
INC. v. ANDREW SEISOON CHUNG

PRE-TRIAL STATUS CONFERENCE (Fr 6/25/15)

ATTORNEY: JI KIM (ELITE OF LOS ANGELES, INC., SAN DIEGO TESTING
SERVICES, INC.)
ATTORNEY: RICHARD E. CHANG (ANDREW SEISOON CHUNG)

7 - 14-02943-LA Ch 7 SAMER ZETO
ADV: 14-90138 ALBERT YAFEH v. SAMER ZETO

PRE-TRIAL STATUS CONFERENCE (Fr 6/25/15)

ATTORNEY: MAXWELL C. AGHA (ALBERT YAFEH)
ATTORNEY: QUINTIN G. SHAMMAM (SAMER ZETO)

8 - 15-00905-LA Ch 7 JOHN M LONNEKER
ADV: 15-90082 STEPHEN J. ALTER v. JOHN M LONNEKER

PRE-TRIAL STATUS CONFERENCE

ATTORNEY: BRIAN A. KRETSCH (STEPHEN J. ALTER)
ATTORNEY: JOHN W. CUTCHIN (JOHN M LONNEKER)

9 - 15-04384-LA Ch 7 DARRIN L. & JOANNAN K. DIETZEN

REAFFIRMATION AGREEMENT BETWEEN DEBTOR AND FORD MOTOR CREDIT COMPANY LLC

Tentative Ruling: Motion to Reaffirm Debt to Ford Motor Credit **DENIED**. Based on Schedules I and J originally filed in this bankruptcy, a presumption of undue hardship exists which the debtor(s) has not rebutted. Debtor(s) must explain the differences between Part II income/expenses and those on originally filed Schedules I and J.

If debtor(s) still desires to reaffirm this debt, the court will give debtor(s) a **ONE TIME CONTINUANCE** to file a declaration under penalty of perjury explaining the differences and attaching to the declaration new Schedules I and J showing current income and expenses. Further, if debtor(s) is relying on contributions from family members (their daughter), a separate declaration from each family member who contributes must be filed, stating: (1) he or she is financially able to contribute an amount sufficient to cover the payment to this creditor in the event debtor is unable to do so and (2) he or she is willing to make this contribution, if required, until the end of the contract with this creditor.

Court notes that debtor(s) original schedules show a deficit of income/expenses of in excess of \$333./mo. If debtor(s) cannot show sufficient income, including the family contribution, at present to pay normal monthly living expenses plus this vehicle payment, Court strongly urges debtor(s) NOT to request a continued hearing and instead discuss with their counsel accepting a *Moustafi* order denying this reaffirmation agreement.

ATTORNEY: DAVID G. WEIL (DARRIN L. DIETZEN, JOANNAN K. DIETZEN)

10 - 08-07790-LA Ch 7 YESENA CONTRERAS

MOTION TO AVOID JUDICIAL LIEN ON DEBTOR'S REAL PROPERTY

Tentative Ruling: Motion to Avoid Judicial Lien **DENIED**. Unopposed

To avoid a judicial lien under Sec. 522(f)(1)(A) debtor must establish:

1. There is an exemption to which the debtor would have been entitled;
2. The subject property is listed on the debtor's schedules and claimed exempt;
3. The lien must impair that exemption, and
4. The lien is a judicial lien

In re: Goswami, 304 B.R. 386, 390 (9th Cir. BAP, 2003)

Debtor has not satisfied the second and third elements to avoid the lien. She did not claim the subject property exempt in her Schedule C; therefore, the judicial lien cannot impair that exemption. Instead, she appears to argue that she claimed the subject property exempt by utilizing her "wild card" exemption of \$21,515. She is incorrect. She already used her wild card exemption to exempt all of her "other personal property" not already listed. The subject property is real property, not personal property and the balance of her wildcard exemption was exhausted by the exemptions she elected.

Further, this motion has a service defect. The proof of service attached to the hearing notice reflects that the Notice of Motion and Hearing was served; however it does not state that the underlying motion itself was serviced (ECF #33). The Notice of Motion and Hearing does not provide enough information about the nature of the relief requested to provide fair notice of the lien, property and creditor to be affected.

If counsel for the debtor is prepared to accept the tentative ruling, s/he should notify the courtroom deputy and appearance will be excused. In that event, counsel shall prepare an order denying this motion.

ATTORNEY: BRIAN CROZIER WHITAKER (YESENA CONTRERAS)

11 - 10-11788-LA Ch 11 **FRANK M. JODZIO**

MOTION FOR COURT CONSENT TO ENTER INTO LOAN MODIFICATION AGREEMENT FILED BY DREW CALLAHAN ON BEHALF OF US BANK NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO STATESTREET BANK AND TRUST COMPANY AS TRUSTEE FOR THE BENEFIT OF THE HOLDERS OF BEAR STEARNS STRUCTURED SECURITIES, INC MORTGAGE PASS TROUGH CERTIFICATES SERIES 1997-2

Tentative Ruling: Motion for Court order approving debtor's entry into Loan Modification Agreement **DENIED**. Unopposed.

1. Debtor was not personally liable for this debtor when he entered into this bankruptcy case. There is no explanation offered justifying approval of an agreement that makes him personally liable on the debt at this time.

2. The agreement was executed in July 2014. No explanation given why Court is being asked to approve it at this late date.

3. Debtor's Ch. 11 plan was confirmed by order entered 6/21/11. Except for monitoring and enforcing the debtor's performance of his plan obligations, Court has no continuing jurisdiction over this debtor's affairs.

If counsel for movant is prepared to accept the tentative ruling, s/he should contact the courtroom deputy and appearances will be excused. In that event, counsel for movant shall prepare an order denying the motion.

12 - 14-05071-LA Ch 7 **MATTHEW ALAN & TRACY LEE BURKS**

TRUSTEE'S MOTION FOR AN ORDER APPROVING OVERBID PROCEDURES FOR SALE OF ESTATE'S MEMBERSHIP INTEREST IN ADIO LLC, FILED BY LISA TORRES ON BEHALF OF CHRISTOPHER BARCLAY

Tentative Ruling: **REVISED TENTATIVE RULING:**

Motion to Approve Overbid Procedures for Sale of Estate's Membership Interest in Adio, LLC **GRANTED**. Unopposed and bid procedures appear reasonable.

Court has reviewed Supp. Dec. re: marketing plans and is satisfied with the trustee's strategy for marketing the sale of this membership interest.

Appearances are excused. Submit order.

ATTORNEY: DAVID E. BRITTON (MATTHEW ALAN BURKS, TRACY LEE BURKS)

02:00 PM

13 - 15-03371-LA Ch 7 KYLE E KODRA

CREDITOR'S MOTION TO DISMISS CH. 7 CASE FILED BY SAMUEL H. PARK
ON BEHALF OF REBECCA SIROIS.

Tentative Ruling: **MATTER TO BE SET FOR EVIDENTIARY HEARING.** Movant and
debtor to be come to this hearing prepared to discuss discovery, if any,
and possible trial dates.

While Court understand trustee's desire to investigate and perhaps
pursue and avoidance action for the benefit of all creditors, the test for
determining whether a case should be dismissed as abusive is the totality
of circumstances test. In this case, the Court believes movant has
presented sufficient evidence to create a triable issue of fact as to
whether this case is abusive such that it should be dismissed.

ATTORNEY: THOMAS B. GORRILL (KYLE E KODRA)

14 - 15-05200-LA Ch 11 ROBERT WAYNE SEDLAR

- 1) MOTION FOR RELIEF FROM STAY, RS # RDN-1 FILED BY RANDALL D. NAIMAN ESQ. ON BEHALF OF U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF8 MASTER PARTICIPATION TRUST (Fr 9/24/15)

Tentative Ruling: Motion for Relief from Stay **GRANTED**. W/r/t issue of standing, the declarations filed in support of the motion and the exhibits attached thereto provide "colorable" standing for movant to seek stay relief. Movant's trustee's deed upon sale was issued 4/2/15 and recorded 4/9/15. Debtor's purported quit claim deed was recorded over on 4/21/15.

Debtor's equitable rights, if any, arise from a deed that was not of record at the time of the foreclosure sale. (See D'rs. Ex. 1). To the extent debtor asserts he is the owner of the property, debtor retains his state law quiet title action pending against movant (which action is not stayed). As to debtor's "show-me-the-note" defenses and other defenses directed to movant's lack of standing to foreclose, movant's arguments are misplaced. Movant is not seeking relief from stay to foreclose a note and deed of trust. Rather movant purchased the property at a foreclosure and has produced a recorded

Trustee's Deed Upon Sale evidencing same. Movant has established colorable standing to seek stay relief to exercise its state law rights and remedies to recover possession of the property.

- 2) MOTION FOR RELIEF FROM STAY, RS # MDZ-001 .00 FILED BY MICHAEL D. ZEFF ON BEHALF OF DEUTSCHE BANK NATIONAL TRUST COMPANY AMERICAS, AS TRUSTEE FOR MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-QO8 (Fr 9/24/15)

Tentative Ruling: Motion for Relief from Stay **GRANTED**.

W/r/t issue of standing, the declarations filed in support of the motion and the exhibits attached thereto provide "colorable" standing for movant to seek stay relief. Movant's trustee's deed upon sale was issued 4/7/15 and recorded 4/16/15. The 3 day/90 day Notice to Quit was served on the prior owners Guriel and all other persons in possession or occupancy as well as their renters and an unlawful detainer filed all before debtor filed bankruptcy. Debtor's purported quit claim deed was recorded on 4/16/15, more than one week after the trustee's sale. Debtor's equitable rights, if any, arise from a deed that was not of record at the time of the foreclosure sale. To the extent debtor asserts he is the owner of the property, debtor retains his state law quiet title action pending against movant (which action is not stayed). As to debtor's "show-me-the-note" defenses and other defenses directed to movant's lack of standing to foreclose, movant's arguments are misplaced. Movant is not seeking relief from stay to foreclose a note and deed of trust; it has already done so. Rather movant purchased the property at a foreclosure and has produced a recorded Trustee's Deed Upon Sale evidencing same. Movant has established colorable standing to seek stay relief to exercise its state law rights and remedies to recover possession of the property.

- 3) ORDER RE: CHAPTER 11 PETITION 1) SETTING STATUS CONFERENCE; 2) SETTING COMPLIANCE DEADLINES; AND 3) SETTING SANCTIONS, IF APPROPRIATE, INCLUDING DISMISSAL, CONVERSION OR APPOINTMENT OF A CHAPTER 11 TRUSTEE OR EXAMINER BECAUSE OF NONCOMPLIANCE WITH ABOVE-REFERENCE REQUIREMENTS (Fr 9/24/15)

Tentative Ruling: **MATTER OFF CALENDAR**. Case was converted to one under Chapter 7 by order submitted by the UST for debtor's failure to comply with orders made at the court hearing held 9/24/15. Appearances excused.

02:00 PM

15 - 13-08342-LA Ch 7 JAMES B. & PAULA J. OENNING

ADV: 15-90049

CHRISTOPHER BARCLAY v. JAMES B. OENNING & PAULA J. OENNING

DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

Tentative Ruling: Motion to Dismiss First Amended Complaint **DENIED**.

The FAC is no longer a formulaic recital of the elements to state a claim for relief under Sec. 727(d)(2) and/or (d)(3). It now pleads ample additional factual content to enable the Court to plausibly infer that the debtors may be liable for the relief requested. [See new allegations in FAC para. 14, 15, 16, 24, 25, 26, 27, 28, 29, 38, 39, 40, 41 and 42].

Where, as here, fraudulent conduct is pled, the circumstances that constitute the fraud must be pled with particularity, however, the allegations of the defendant's "malice, intent, knowledge and other conditions of a person's state of mind" may be alleged generally, FRCivP 9(b); *MacDonald v. Ford Motor*, 37 F. Supp 3d 1087 (N.D., Cal, 2014)

Defendant's "timeliness" argument is not well-taken. The trustee's complaint arises from facts and events that transpired after the debtors' discharge was granted. The trustee could not have known that the debtors would fail to turnover POE until after their exemption was disallowed and the demand for turnover made. Likewise, he could not have known the debtors would refuse to obey the turnover order until after it was entered and the time for compliance elapsed.

Finally, the trustee is not required to plead that the debtors still possess the exact same monies that they attempted to exempt. See *In re Newman*, 487 B.R. 193, 198-201 (9th Cir. BAP, 2013)[explaining that a debtor who had spent a tax refund that was POE must still deliver and account for the monies of their equivalent value, even though he no longer possessed the monies when the turnover motion was filed]. Here, the FAC pleads the debtors had non-exempt monies in their SDCCU bank account which they did not deliver to the trustee. The debtors' state of mind in failing to do so can be plausibly inferred. Ultimately, it is a factual issue for trial.

If counsel for the debtors is prepared to accept the tentative ruling, he should notify counsel for the trustee and the courtroom deputy and appearances will be excused. In that event, debtors' counsel is ordered to answer the FAC within 14 days from the date of this hearing.

ATTORNEY: YOSINA M. LISSEBECK (CHRISTOPHER BARCLAY)

ATTORNEY: GENE KOON (JAMES B. OENNING, PAULA J. OENNING)

16 - 15-02399-LA Ch 7 RAUL & ALMA A MOLINA

- 1) MOTION TO AVOID JUDICIAL LIEN OF STATE OF CALIFORNIA,
EMPLOYMENT DEVELOPMENT DEPARTMENT FILED BY KERRY A. DENTON

Tentative Ruling: Motion to Avoid Judicial Lien of the EDD **DENIED**. Unopposed.

To avoid a judicial lien under Sec. 522(f)(1)(A) debtor must establish:

1. There is an exemption to which the debtor would have been entitled;
2. The subject property is listed on the debtor's schedules and claimed exempt;
3. The lien must impair that exemption, and
4. The lien is a judicial lien

In re: Goswami, 304 B.R. 386, 390 (9th Cir. BAP, 2003)

The Court cannot determine from this motion or declaration that any of these elements are met. W/r/t element #4, the mere fact that a lien arises from a judgment does not mean it is a judicial lien. See *In re Washington*, 242 F. 3d 1320, 1323-4 (11th Cir., 2001) [explaining that liens that arise by operation of law are not judicial liens irrespective of whether such liens are ultimately recognized by a judgment; therefore, they may not be avoided by Sec. 522(f)(1)] In this instance, it is possible that the EDD lien is a statutory lien.

Additionally, there is a service defect. The proof of service (ECF #25) does not affirmatively represent that movant has complied with FRBP 4003(d) and FRBP 9014(b) which incorporates the service requirements of FRBP 7004(b)(6) for serving municipal corporations or governmental entities. See also CCP Sec. 416.50(a). Court requires a declaration from counsel that such service was effectuated and an amended proof of service.

If counsel is prepared to accept the tentative ruling, he should notify the courtroom deputy and his appearance will be excused. In that event, he shall prepare an order denying this motion.

- 2) MOTION TO AVOID LIEN OF CITIBANK FILED BY KERRY A. DENTON

Tentative Ruling: Motion to Avoid judicial lien of Citibank **DENIED**. Unopposed.

To avoid a judicial lien under Sec. 522(f)(1)(A) debtor must establish:

1. There is an exemption to which the debtor would have been entitled;
2. The subject property is listed on the debtor's schedules and claimed exempt;
3. The lien must impair that exemption, and
4. The lien is a judicial lien

In re: Goswami, 304 B.R. 386, 390 (9th Cir. BAP, 2003)

The Court cannot determine from this motion or the declaration in support whether any of these elements are met.

Additionally, there is a service defect. FRBP 4003(d) provides that a motion to avoid a judicial lien pursuant to Sec. 522(f) is a contested matter. Therefore, service of this motion must comply with FRBP 9014(b) which incorporates the service requirements of FRBP 7004, including the more rigorous service requirements in Rule 7004(h) for serving federally insured depository institutions by certified mail. Because the proof of service attached to the hearing notice (ECF #27) does not represent that service was by certified mail, the service appears to be defective.

If counsel is prepared to accept the tentative ruling, he should notify the courtroom deputy and his appearance will be excused. In that event, he

shall prepare an order denying this motion.

ATTORNEY: KERRY A. DENTON (ALMA A MOLINA, RAUL MOLINA)

02:00 PM

17 - 15-06032-LA Ch 7 LORENE BRYANT

APPLICATION FOR WAIVER OF THE CHAPTER 7 FILING FEE FOR INDIVIDUALS WHO CANNOT PAY THE FILING FEE IN FULL OR IN INSTALLMENTS.

Tentative Ruling: **MATTER OFF CALENDAR.** Debtor has now timely filed her schedules and SOFA and Court is now able to rule on application for waiver of filing fee (and has done so). Debtor's appearance at this hearing is excused.

ATTORNEY: E. JOHN DAMASCO (LORENE BRYANT)

18 - 08-13249-LA Ch 7 BARRATT AMERICAN INCORPORATED

- 1) FIFTH AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES AS ACCOUNTANTS AND CONSULTANTS TO THE CHAPTER 7 TRUSTEE FOR SQUAR, MILNER, PETERSON, MIRANDA & WILLIAMSON, LLP, ACCOUNTANT, PERIOD: 4/1/2014 TO 9/9/2015, FEE: \$ 10,518.00, EXPENSES: \$261.10.

Tentative Ruling: Court has reviewed Fifth and Final Application for Compensation and Expense Reimbursement filed by accountants for the Ch. 7 trustee and finds services necessary and charges for same reasonable. Court awards amounts requested in full. Further, court confirms this interim application and the four prior interim application awards as final.

As this application is unopposed, the representative of Squar Milner is excused from attending this hearing and may submit an order forthwith.

- 2) TENTH AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES OF PYLE SIMS DUNCAN & STEVENSON, ATTORNEYS FOR RICHARD M. KIPPERMAN, CH. 7 TRUSTEE, PERIOD: 11/1/14 TO 9/10/15, FEE \$107,318.00; EXPENSES \$149.65 (PLUS \$1,000 FOR CLOSING)

Tentative Ruling: Court has reviewed Tenth and Final Application for Compensation and Expense Reimbursement filed by counsel for the Ch. 7 trustee and finds services necessary and charges for same reasonable. Court awards amounts requested in full. Further, Court confirms as final this interim award and the nine prior interim awards.

Court commends counsel for the outstanding job done on behalf of the trustee. A virtually no-asset case has, through counsel's efforts, resulted in recovery of numerous unscheduled real estate parcels, clearing complicated claims, tax liens, and the like and realizing over \$20 million for the benefit of creditors.

As this application is unopposed, a representative of Pyle, Sims is excused from attending this hearing and may submit an order forthwith.

ATTORNEY: RICHARD H. GOLUBOW (BARRATT AMERICAN INCORPORATED)

02:00 PM

19 - 15-04158-LA Ch 7 VIRGINIA GREEN

REAFFIRMATION AGREEMENT BETWEEN DEBTOR AND TOYOTA MOTOR
CREDIT CORPORATION

Tentative Ruling:

Motion to Reaffirm Debt to Toyota Motor Credit **GRANTED**. Debtor has adequately explained the differences between income and expenses originally shown when bankruptcy filed and those shown on Part D of this reaffirmation agreement. Further, it appears she can afford this car payment.

As this motion is unopposed, debtor is excused from attending this hearing. Court will prepare order approving reaffirmation.

ATTORNEY: MICHAEL KOCH (VIRGINIA GREEN)